

Ogonna Brown, Esq.  
Nevada Bar No. 7589  
OBrown@lrrc.com  
LEWIS ROCA ROTHGERBER CHRISTIE LLP  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169  
Tel: 702.949.8200  
Fax: 702.949.8398

Brian K. Murphy, Esq.  
murphy@mmmb.com  
Jonathan P. Misny, Esq.  
misny@mmmb.com  
Murray Murphy Moul + Basil LLP  
1114 Dublin Road  
Columbus, OH 43215  
Tel: 614.488.0400  
Fax: 614.488.0401

*Attorneys for Plaintiff Louis Naiman*

*Pro Hac Vice*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

LOUIS NAIMAN, on behalf of himself and  
others similarly situated,

Plaintiff,

v.

BLUE RAVEN SOLAR, LLC and  
RENOVATION REFERRAL LLC and  
GABRIEL ALAN SOLOMON

Defendants.

CIVIL ACTION FILE NO. 2:19-cv-1643-JAD-EJY

**FIRST AMENDED COMPLAINT – CLASS  
ACTION**

**JURY TRIAL DEMANDED**

**Preliminary Statement**

1. Plaintiff Louis Naiman (“Plaintiff” or “Mr. Naiman”) brings this action to enforce the consumer-privacy provisions of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in 1991 in response to widespread public outrage about the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

2. Mr. Naiman alleges that Blue Raven Solar, LLC (“Blue Raven Solar”) commissioned automated telemarketing calls to Mr. Naiman and other putative class members without their prior express written consent.

3. Mr. Naiman alleges that a company that Renovation Referral LLC (“Renovation Referral”), which is owned and operated by Gabriel Alan Solomon made the automated telemarketing calls at issue.



1 The Plaintiff has personal jurisdiction over the remaining defendants because they engaged in the  
2 actual automated calling into this District.

3 12. Venue is proper under 28 U.S.C. § 1391(b)(1) because a substantial part of the  
4 events or omissions giving rise to the claim occurred in this district, as the automated call at issue  
5 was made to and received by the Plaintiff in this district.

### 6 **TCPA Background**

7 13. In 1991, Congress enacted the TCPA to regulate the explosive growth of the  
8 telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing ...  
9 can be an intrusive invasion of privacy [.]” Telephone Consumer Protection Act of 1991, Pub. L.  
10 No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

#### 11 The TCPA Prohibits Automated Telemarketing Calls to Cellular Telephones

12 14. The TCPA makes it unlawful “to make any call (other than a call made for  
13 emergency purposes or made with the prior express consent of the called party) using an  
14 automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone  
15 number assigned to a ... cellular telephone service.” *See* 47 U.S.C. § 227(b)(1)(A)(iii). The  
16 TCPA provides a private cause of action to persons who receive calls in violation of 47 U.S.C.  
17 § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

18 15. According to findings by the Federal Communication Commission (“FCC”), the  
19 agency Congress vested with authority to issue regulations implementing the TCPA, such calls  
20 are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater  
21 nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and  
22 inconvenient.

23 16. The FCC also recognized that “wireless customers are charged for incoming calls  
24 whether they pay in advance or after the minutes are used.” *In re Rules and Regulations*  
25 *Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order, 18  
26 FCC Rcd. 14014, 14115, ¶ 165 (2003).

17. In 2013, the FCC required prior express written consent for all autodialed or prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines. Specifically, it ordered that:

[A] consumer’s written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.[] In addition, the written agreement must be obtained “without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.[]”

*In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1844 (2012) (footnotes omitted).

#### The Growing Problem of Automated Telemarketing

18. “Robocalls and telemarketing calls are currently the number one source of consumer complaints at the FCC.” Tom Wheeler, *Cutting Off Robocalls* (July 22, 2016), <https://www.fcc.gov/news-events/blog/2016/07/22/cutting-robocalls> (statement of FCC chairman).

19. “The FTC receives more complaints about unwanted calls than all other complaints combined.” Staff of the Federal Trade Commission’s Bureau of Consumer Protection, *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, at 2 (2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-staff-ftc-bureau-consumer-protection-federal-communications-commission-rules-regulations/160616robocallscomment.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-ftc-bureau-consumer-protection-federal-communications-commission-rules-regulations/160616robocallscomment.pdf).

20. In fiscal year 2017, the FTC received 4,501,967 complaints about robocalls, compared with 3,401,614 in 2016. Federal Trade Commission, *FTC Releases FY 2017 National Do Not Call Registry Data Book and DNC Mini Site* (Dec. 18, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-nationaldo-not-call-registry-data-book-dnc>.

21. *The New York Times* reported on the skyrocketing number of robocall complaints and widespread outrage about illegal telemarketing. Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018), <https://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html>; see also Katherine Bindley, *Why Are There So Many Robocalls? Here's What You Can Do About Them*, Wall St. J. (July 4, 2018), <https://www.wsj.com/articles/why-there-are-so-many-robocalls-heres-what-you-can-do-about-them-1530610203>.

22. According to a respected robocall watch site, robocalls have increased by a whopping 494% in a four year span: from 8.9 billion in the last three quarters of 2015 to 43 billion in the same nine months of 2019. See YouMail Robocall Index, Historical Robocalls by Time, available at <https://robocallindex.com/history/time/> (accessed March 5, 2020).

23. Of the 58.5 billion robocalls made in 2019, YouMail reports that over half of these calls—56%—were scam calls, spoofed calls, or telemarketing calls. *Id.*

#### Individual Officer Liability under the TCPA

24. Mr. Solomon is the owner and operator of Renovation Referral and is liable for its conduct.

25. Under the TCPA, an individual such as Mr. Solomon, may be personally liable for the acts alleged in this Complaint pursuant to 47 U.S.C. § 217 of the TCPA, which reads, *inter alia*:

[T]he act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user *as well as of that person*.

See 47 U.S.C. § 217 (emphasis added).

26. When considering individual officer liability under the TCPA, other Courts have agreed that a corporate officer involved in the telemarketing at issue may be personally liable

1 under the TCPA. *See, e.g., Jackson Five Star Catering, Inc. v. Beason*, 2013 U.S. Dist. LEXIS  
2 159985, \*10 (E.D. Mich. Nov. 8, 2013) (“[M]any courts have held that corporate actors can be  
3 individually liable for violating the TCPA “where they ‘had direct, personal participation in or  
4 personally authorized the conduct found to have violated the statute.’”); *Maryland v. Universal*  
5 *Elections*, 787 F. Supp. 2d 408, 415-16 (D. Md. 2011) (“If an individual acting on behalf of a  
6 corporation could avoid individual liability, the TCPA would lose much of its force.”).

7  
8 27. Mr. Solomon personally participated in the actions complained of by (a) selecting  
9 some of the phone numbers that would be called; (b) choosing the automated equipment that  
10 would be used; (c) personally loading the lists of numbers and sending the calls at issue; and (d)  
11 personally authorizing any other conduct of Renovation Referral.

### 12 **Factual Allegations**

#### 13 Call to Mr. Naiman

14  
15 28. Plaintiff Naiman is a “person” as defined by 47 U.S.C. § 153(39).

16 29. Mr. Naiman’s telephone number, (707) 832-XXXX, is registered to a cellular  
17 telephone service.

18 30. On April 8, 2019 at 11:01 AM, Mr. Naiman received an automated telemarketing  
19 call to his cellular telephone number from the caller ID (707) 210-0004.

20 31. When Mr. Naiman answered the call, there was a distinctive click and a pause  
21 before the telemarketing sales representative came on the line.

22 32. This click and pause is a telltale sign of a predictive dialer. The click and pause  
23 signifies the algorithm of the predictive dialer operating. The predictive dialer dials thousands of  
24 numbers at once and only transfers the call to a live agent once a human being is on the line. As a  
25 result, this telemarketing activity shifts the burden of wasted time to call recipients such as Mr.  
26 Naiman.

1           33. A predictive dialer is an automatic telephone dialing system (“ATDS”) as that  
2 term is defined by the TCPA.

3           34. Because of the predictive dialer, Mr. Naiman was greeted with dead air when he  
4 answered the call before a live person finally came on the line.

5           35. The Caller ID for the call, (707) 210-0004, is a non-working “spoofed” number.

6           36. The fact that the Caller ID was spoofed is further evidence of the use of an ATDS,  
7 as it typically takes a computer dialing system to manipulate the Caller ID that will display on the  
8 call recipient’s phone.

9           37. Discovery has revealed that this call was made using the Ytel predictive dialer.

10          38. The Ytel predictive dialer has

11          39. A telemarketing sales representative named “Ryan” came on the line and, using a  
12 scripted sales pitch, asked Mr. Naiman a series of questions to determine his interest in and  
13 qualifications for solar panel installation for his residence.

14          40. “Ryan” told Mr. Naiman that his company was called “Renew Solar Power,”  
15 although upon further research there do not appear to be any entities doing business in or  
16 engaging in telemarketing into the United States using that name.

17          41. Upon verifying Mr. Naiman’s qualifications, “Ryan” directly transferred the call to  
18 Blue Raven Solar while Mr. Naiman remained on the line.

19          42. “Ammon Musselman” then came on the line and informed Mr. Naiman that the  
20 name of his company was “Blue Raven Solar” and proceeded to attempt to sell Mr. Naiman Blue  
21 Raven Solar products and services for installation in his residence.

22          43. Musselman gave Mr. Naiman the website address of BlueRavenSolar.com, which  
23 is Blue Raven Solar’s website, and informed Plaintiff that he was located in Las Vegas, Nevada.  
24 He provided Mr. Naiman his direct phone number of (702) 710-1287.

25          44. Mr. Naiman provided an email address so that he could confirm the identity of the  
26 caller. He proceeded to receive an email from Musselman listing Blue Raven Solar along with  
27 his contact information.

1           45. Mr. Naiman is not a customer of Defendant or Renovation Referral and has not  
2 consented to receive telemarketing calls prior to the receipt of these calls.

3           46. Plaintiff and the other call recipients were harmed by these calls. They were  
4 temporarily deprived of legitimate use of their phones because the phone line was tied up during  
5 the telemarketing calls, and their privacy was improperly invaded. Moreover, these calls injured  
6 Plaintiff and the other call recipients because they were frustrating, obnoxious, annoying, were a  
7 nuisance, and disturbed the solitude of Plaintiff and the class.

8                           **Blue Raven Solar’s Liability for Renovation Referral’s Conduct**

9           47. For more than twenty years, the FCC has explained that its “rules generally  
10 establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any  
11 violations.” *In re Rules & Regulations Implementing the TCPA*, CC Docket No. 92-90,  
12 Memorandum Opinion and Order, 10 FCC Rcd. 12391, 12397, ¶ 13 (1995).

13           48. In its January 4, 2008 ruling, the FCC likewise held that a company on whose  
14 behalf a telephone call is made bears the responsibility for any violations. *Id.* (specifically  
15 recognizing “on behalf of” liability in the context of an autodialed or prerecorded message call  
16 sent to a consumer by a third party on another entity’s behalf under 47 U.S.C. § 227(b)).

17           49. In fact, the Federal Communication Commission has instructed that sellers such as  
18 Blue Raven Solar may not avoid liability by outsourcing telemarketing to third parties, such as  
19 Renovation Referral:

20                   [A]llowing the seller to avoid potential liability by outsourcing its telemarketing  
21 activities to unsupervised third parties would leave consumers in many cases  
22 without an effective remedy for telemarketing intrusions. This would particularly  
23 be so if the telemarketers were judgment proof, unidentifiable, or located outside  
24 the United States, as is often the case. Even where third-party telemarketers are  
25 identifiable, solvent, and amenable to judgment limiting liability to the  
26 telemarketer that physically places the call would make enforcement in many cases  
27 substantially more expensive and less efficient, since consumers (or law  
28 enforcement agencies) would be required to sue each marketer separately in order  
to obtain effective relief. As the FTC noted, because “[s]ellers may have thousands  
of ‘independent’ marketers, suing one or a few of them is unlikely to make a  
substantive difference for consumer privacy.”



1 *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the*  
 2 *TCPA Rules*, 28 FCC Rcd. 6574, 6588, ¶ 37 (2013) (“May 2013 FCC Ruling”) (internal citations  
 3 omitted).

4 50. On May 9, 2013, the FCC released a Declaratory Ruling holding that a corporation  
 5 or other entity that contracts out its telephone marketing “may be held vicariously liable under  
 6 federal common law principles of agency for violations of either section 227(b) or section 227(c)  
 7 that are committed by third-party telemarketers.”<sup>1</sup>

8 51. The May 2013 FCC Ruling held that, even absent evidence of a formal contractual  
 9 relationship between the seller and the telemarketer, a seller is liable for telemarketing calls if the  
 10 telemarketer “has apparent (if not actual) authority” to make the calls. *Id.* at 6586, ¶ 34.

11 52. The May 2013 FCC Ruling further clarifies the circumstances under which a  
 12 telemarketer has apparent authority:

13 [A]pparent authority may be supported by evidence that the seller allows the  
 14 outside sales entity access to information and systems that normally would be  
 15 within the seller’s exclusive control, including: access to detailed information  
 16 regarding the nature and pricing of the seller’s products and services or to the  
 17 seller’s customer information. The ability by the outside sales entity to enter  
 18 consumer information into the seller’s sales or customer systems, as well as the  
 19 authority to use the seller’s trade name, trademark and service mark may also be  
 20 relevant. It may also be persuasive that the seller approved, wrote or reviewed the  
 21 outside entity’s telemarketing scripts. Finally, a seller would be responsible under  
 22 the TCPA for the unauthorized conduct of a third-party telemarketer that is  
 23 otherwise authorized to market on the seller’s behalf if the seller knew (or  
 24 reasonably should have known) that the telemarketer was violating the TCPA on  
 25 the seller’s behalf and the seller failed to take effective steps within its power to  
 26 force the telemarketer to cease that conduct.

27 *Id.* at 6592, ¶ 46.

28 53. Blue Raven Solar is liable for the telemarketing calls that were initiated by  
 Renovation Referral before being transferred to Blue Raven Solar.

54. Blue Raven Solar hired Renovation Referral to originate new business using  
 automated telemarketing calls.

<sup>1</sup> May 2013 FCC Ruling, 28 FCC Rcd. at 6574, ¶ 1.

1           55.     Blue Raven Solar could have restricted Renovation Referral from using automated  
2 telemarketing, but it did not.

3           56.     Blue Raven Solar also accepted the benefits of “Renew Solar Power’s” illegal  
4 telemarketing by accepting live transfers of leads directly from “Renew Solar Power,” despite the  
5 fact that those leads were generated through illegal telemarketing.

6           57.     Blue Raven Solar had absolute control over whether, and under what  
7 circumstances, it would accept a customer.

8           58.     Blue Raven Solar determined the parameters and qualifications for customers to be  
9 transferred to a live Blue Raven Solar representative and required Renovation Referral to adhere  
10 to those requirements.

11          59.     Blue Raven Solar knew (or reasonably should have known) that Renovation  
12 Referral was violating the TCPA on its behalf and failed to take effective steps within its power to  
13 force the telemarketer to cease that conduct. Any reasonable seller that accepts telemarketing call  
14 leads from lead generators would, and indeed must, investigate to ensure that those calls were  
15 made in compliance with TCPA rules and regulations.

16          60.     By having Renovation Referral initiate the calls on its behalf to generate new  
17 business, Blue Raven Solar “manifest[ed] assent to another person ... that the agent shall act on  
18 the principal’s behalf and subject to the principal’s control” as described in the Restatement  
19 (Third) of Agency.

20          61.     Renovation Referral transferred customer information directly to Blue Raven  
21 Solar. Thus, the company that Blue Raven Solar hired has the “ability ... to enter consumer  
22 information into the seller’s sales or customer systems,” as discussed in the May 2013 FCC  
23 Ruling.

24          62.     Blue Raven Solar approved the Renovation Referral script for determining  
25 whether a customer was eligible to be transferred directly to speak with a Blue Raven Solar  
26 employee, as discussed in the May 2013 FCC Ruling.

63. Finally, the May 2013 FCC Ruling states that called parties may obtain “evidence of these kinds of relationships ... through discovery, if they are not independently privy to such information.” *Id.* at 6592-593, ¶ 46. Evidence of circumstances pointing to apparent authority on behalf of the telemarketer “should be sufficient to place upon the seller the burden of demonstrating that a reasonable consumer would not sensibly assume that the telemarketer was acting as the seller’s authorized agent.” *Id.* at 6593, ¶ 46.

### Class Action Allegations

64. As authorized by Rule 23(b)(2) and/or (b)(3) of the Federal Rules of Civil Procedure, Plaintiff brings this action on behalf of a class of all other persons or entities similarly situated throughout the United States.

65. The class of persons Plaintiff proposes to represent is tentatively defined as:

All persons within the United States to whom: (a) Either Defendant, and/or a third party acting on its behalf, made one or more non-emergency telephone calls; (b) to their cellular telephone number; (c) using the Ytel or similar dialing system; and (d) at any time in the period that begins four years before the date of the filing of this Complaint to trial.

66. Excluded from the class are counsel, the Defendants, any entities in which the Defendants have a controlling interest, the Defendants’ agents and employees, any judge to whom this action is assigned, and any member of such judge’s staff and immediate family.

67. The class as defined above is identifiable through phone records and phone number databases.

68. The potential class members number at least in the thousands. Individual joinder of these persons is impracticable.

69. Plaintiff is a member of the class.

70. There are questions of law and fact common to Plaintiff and to the proposed class, including but not limited to the following:

a. Whether Defendants violated the TCPA by using automated calls to contact putative class members’ cellular telephones;





MURRAY MURPHY MOUL + BASIL LLP

By: /s/ Brian K. Murphy

Brian K. Murphy (admitted *pro hac vice*)  
murphy@mmmb.com  
Jonathan P. Misny (admitted *pro hac vice*)  
misny@mmmb.com  
1114 Dublin Road  
Columbus, OH 43215  
Tel.: 614.488.0400  
Fax: 614.488.0401

Ogonna Brown, Bar No. 7589  
OBrown@lrrc.com  
3993 Howard Hughes Parkway, Suite 600  
Las Vegas, NV 89169  
Tel.: 702.949.8200  
Fax: 702.949.8398

*Attorneys for Plaintiff*

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Brian K. Murphy  
Brian K. Murphy